

HERMAN S. REXFORD
WILSON SOPLU

IBLA 75-470
IBLA 75-476

Decided September 9, 1975

Appeal from Bureau of Land Management decision rejecting Native allotment applications F-16440 and F-16652.

Affirmed.

1. Alaska: Native Allotments

Lands in the Arctic National Wildlife Range may not be made available for Native allotment unless the allotment applicant initiated substantial use and occupancy more than 5 years prior to the withdrawal of the land.

APPEARANCES: William D. Rives, Esq., Seattle, Washington, for appellants.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Herman S. Rexford and Wilson Soplu each appeal from separate decisions of the Alaska State Office, Bureau of Land Management, rejecting their respective applications for allotment of three tracts of land each in the Arctic National Wildlife Refuge. As the cases are virtually identical, they will be consolidated.

Rexford states in his application that he initiated his use of the described lands in November 1942. Soplu alleges that the use of the lands described in his application began in July 1939. All of the land in question was withdrawn by Public Land Order No. 82, effective February 3, 1943, and has been closed to the location or perfection of such claims since that date.

A Secretarial instruction, dated October 18, 1973, included the following:

2. Where a Native has not completed the five-year period of statutory use and occupancy of lands

prior to the effective date of a withdrawal or reservation of the lands, the allotment application should be rejected.

The Alaska State Office determined that the applicants could not have completed the requisite 5-year occupancy prior to the withdrawal of the lands and, applying the Secretary's instruction, it rejected the applications. ^{1/}

Each applicant was notified that his application was being held for rejection, and the reason why it was considered deficient. Each was given an opportunity to submit further evidence. Each subsequently received a second notice to this effect and a second opportunity to submit evidence. Neither responded, although nearly 11 months elapsed from the date of the first notice to the date of the decision rejecting their respective applications.

On appeal each asserts, in effect, that the requirement that an applicant must show 5 years of qualifying use and occupancy prior to the closure of the land is invalid. This argument has been advanced in many similar appeals and has been consistently rejected by this Board. Henry R. Nashoopuk, 21 IBLA 116 (1975); Thomas Akootchook, 17 IBLA 345 (1974); Christian G. Anderson, 16 IBLA 56 (1974); cf. Herman Joseph, 21 IBLA 199 (1975).

Appellants, by incorporation of statements of reasons and briefs submitted in other appeals, argue further that by their occupancy of the land for less than 5 years prior to its withdrawal they became invested with a "right" to such land which the withdrawals, being "subject to valid existing rights," could not affect. They also assert that lands reserved or withdrawn for purposes of the Arctic National Wildlife Refuge were not thereby closed to allotment under the 1906 Act.

The use and occupancy of public land under the 1906 Act by a Native can never rise to the dignity of a vested legal right to obtain title thereto, even where the Native completes a full 5-year term of qualifying use and occupancy on lands which are at all times open to such occupancy. This is so because such

^{1/} Rexford's application was also rejected in part for the additional reason that the Geological Survey had reported that the land in Parcel C of his application is valuable for phosphate, and only nonmineral lands may be allotted under the Act.

allotments are only granted at the discretion of the Secretary or those who exercise the delegated authority of the Secretary. Since any application for allotment is subject to rejection at discretion, the applicant cannot be said to have a legal right to have it granted. There being no right vested in the Native occupant of Federal land under the Act, he will not be heard to assert that a Federal withdrawal of the land was not efficacious because of his "valid existing right."

Moreover, the Secretary lacks authority under the Act, as amended in 1956, to allot reserved land in Alaska, even if in the exercise of his discretion he desired to do so, as long as such land remains reserved: 2/

The Secretary of the Interior is authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of vacant, unappropriated, and unreserved non-mineral land in Alaska. * * * (Emphasis added.)

43 U.S.C. § 270-1 (1970).

Appellants insist that this 1956 enactment cannot affect their applications, which are based upon prior use and occupancy of the land, because "[t]he due process clause of the Fifth Amendment constitutes a prohibition against retrospective legislation which would operate as a deprivation of vested rights." However, as pointed out above, no rights to these lands have vested in appellants.

Finally, appellants argue that the combined effect of sections 11, 12, 14, and 18 of the Alaska Native Claims Settlement Act (ANCSA), 85 Stat. 688, make it possible for Alaska Natives to acquire title to the surface estate of certain lands within the boundaries of a national wildlife refuge, indicating that ANCSA, which repealed

2/ This provision does not preclude the granting of allotments in national forests under certain circumstances. However, this is a statutory exception to the prohibition in the proceeding section of the statute. 43 U.S.C. § 270-2 (1970). The Secretary retains the option to revoke a withdrawal or reservation to the extent necessary to award a native allotment in any instance where he perceives it to be in the public interest to do so.

the Alaska Native Allotment Act, simultaneously made it possible to acquire land under that Act which was excluded by the Act's own terms. We cannot accept this theory.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

